MOHAMAD KHIRUL MIZAN SHAFIE & ANOR

v.

YUE AH KAI

HIGH COURT MALAYA, TEMERLOH
HISHAMUDIN YUNUS J
[CIVIL APPEAL NO: 12-6-99]
9 MAY 2002

TORT: *Negligence - Road accident - Defendant's motorbus suddenly turning into plaintiffs' right of way - Whether indicative of negligence - Failure to relate how accident occurred - Liability*

DAMAGES: *Personal injuries - Leg fracture - Fracture mid-shaft left radius - Fracture left femur - Permanent disabilities of lower limb - Scarring - Loss of earnings - General and special damages - Quantum*

The plaintiffs had suffered injuries when the motorcyle ridden by the first plaintiff with the second plaintiff riding pillion, had collided against the motorbus driven by the defendant. In the subsequent action for damages against the defendant, the plaintiffs gave evidence that the collision occurred as a result of the motorbus making a sudden turn into their right of way. The defendant denied the allegation, but otherwise gave no explanation as to how the accident came to take place. The learned Sessions Judge ruled that the defendant could not be guilty of negligence, as the position of the plastic splinters indicated that the accident had occurred on his side of the road. The plaintiffs appealed and the issues that arose were: (i) whether on the evidence the learned Sessions Judge ought to have found the defendant liable in negligence; and (ii) if so, as to the measure of damages to be awarded to the plaintiffs.

Held:

[1] The defendant was clearly guilty of negligence as the evidence showed that the bus was cutting across the path of the motorcycle in such a manner that the plaintiffs could not avoid a collision. (p 676 b)

[2] There was no reason for the court to doubt the credibility of the plaintiffs. They had been cross-examined and their testimony remained unshaken. Moreover, evidence regarding the nature of the damage to the two vehicles, including the point of impact to the bus, the likelihood of where the collision had occurred and the point where the motorcycle was lying on the road were all consistent with the plaintiffs' version, in particular

on their assertion that PW4 had swerved to the right in order to avoid the collision. It is also to be noted that the defendant, unlike the plaintiffs, was unable to explain how the accident occurred. (p 676 b-d)

[3] The first plaintiff's evidence that he was at the time working as a mechanic and earning RM500 a month was supported by his employer. And so was the second plaintiff's evidence that he was then earning RM400 a month. However, in the light of the absence of supporting documents to the effect, the amount should be reduced to RM400 per month and RM300 per month respectively. (pp 677 b & 680 b)

[4] The first plaintiff is entitled to special damages of RM534 as agreed by the parties. He is also entitled to special damages of RM7,200, being RM400 x 18 months – the period he was out of work as a result of the accident. (pp 676 e-f & 677 b)

[4a] The first plaintiff is entitled to RM66,000 as general damages for personal injuries, comprising: (a) RM40,000 for 'compound grade IIIB comminuted supracondylar fracture of left femur with extension into the knee joint' which caused certain permanent disabilities to him; (b) RM12,000 for 'closed fracture mid-shaft radius'; (c) RM4,000 for 'closed fracture of fourth metacarpal'; and (d) RM10,000 for 'scarring'. The sum is subject to a 10% deduction for overlapping, leaving him a sum of RM59,400. (p 679 f)

[5] The second plaintiff is entitled to RM162 special damages as agreed by the parties. He is also entitled to RM3,600, being RM300 x 12 months – the period he was out of work as a result of the accident. This apart, he is entitled to RM45,000 as general damages for personal injuries, namely: (a) RM35,000 for 'fracture of the left femur' which resulted in certain permanent disabilities to him; (b) RM5,000 for 'cerebral concussion'; and (c) RM5,000 for 'scarring'. Likewise, 10% of the sum is to be deducted for overlapping, thereby leaving a sum of RM40,500. (p 681 d-e)

[Judgment for plaintiffs; order accordingly.]

Case(s) referred to:

Angappan v. Phua Kim Cheng, Administrator of the Estate of Phua Teck Guan, deceased, Mallal's Digest, Damages (Personal Injury or Death), Entry No 1179 ***(refd)***

Chan Kau Tong v. Ngoh Yong Sin [1965] 2 MLJ 26 ***(refd)***

Chong Kam Siong v. Herman Baharuddin [1992] Mallal's Digest, Entry No 908 ***(refd)***

Er Siew Keng v. Eng Thiang Lai [1990] 1 CLJ 488; [1990] 2 CLJ (Rep) 36 HC ***(refd)***
Fauziyah Mansor v. Abu Bakar Hussin, Mallal's Digest, Damages (Personal Injury and Death), Entry No 1143 ***(refd)***
Ji Wee Sin v. Lim Chong Soon & Anor, Mallal's Digest, Damages (Personal Injury or Death), Entry No 1074 ***(refd)***
Lee Eng Beng & Anor v. Torairajah & Anor [1986] 2 CLJ 421; [1986] CLJ (Rep) 173 SC ***(refd)***
Othman Ahmad v. Samsudin Hj Mohd Sani & Anor [1992] Mallal's Digest, Entry No 888 ***(refd)***
Rohani Mamat & Ors v. Wan Ismail Wan Talib & Anor, Mallal's Digest, (Personal Injury or Death) Entry No 741 ***(refd)***
Rubiah Anuar v. Lim Sang [1998] 3 CLJ Supp 314 HC ***(refd)***
Shuib Awang v. Abdul Manan Abdul Latif [1992] Mallal's Digest 339 ***(refd)***
Sulaiman Aziz v. Abd Razak Abd Wahab, Mallal's Digest (Personal Injury or Death), Entry No 1261 ***(refd)***
Victor Alphonse Sebastian & Anor v. Lee Ah Leek [1987] 2 MLJ 26 ***(refd)***
Yee Yat Wah v. Hoo Wong & Anor, Mallal's Digest, Damages (Personal Injury or Death), Entry No 1278 ***(refd)***

For the plaintiffs/appellants - G Dorai; M/s G Dorai & Co
For the defendant/respondent - Clement Joseph; M/s Dass Jainab & Assoc

Reported by WA Sharif

JUDGMENT

Hishamudin Yunus J:

This is an appeal against the decision of the learned Sessions Court Judge, Temerloh, of 1 March 1999 dismissing the appellants'/plaintiffs' action against the respondent/defendant for damages in respect of injuries suffered.

I allowed the appeal with costs on 9 May 2000. In my view, the findings and decision of the Sessions Court Judge was against the weight of evidence. On the evidence, she ought to have found the defendant liable in negligence and decided in favour for the plaintiffs. I shall now give my grounds.

On The Issue Of Liability

On 26 November 1994, at about 11.30pm, a collision occurred between a motorcycle ridden by the plaintiffs (with the first plaintiff, PW4, as the rider; and the second plaintiff, PW3, as the pillion rider) and a bus driven by the defendant somewhere along the Raub-Kuala Lipis road. Both plaintiffs suffered serious physical injuries as a result of the accident.

According to the plaintiffs, they were from the direction of Kuala Lipis heading towards the direction of Raub while the defendant was from the opposite direction. Originally, each party's vehicle was on its proper lane. However, as

the plaintiffs' motorcycle was about to pass a Mobil petrol station, which was on the left side of the motor cyclists, the bus, driven by the defendant, made a sudden turn to its right, thereby cutting into the path of the motorcyclists. PW4 reacted by swerving to the right but was unable to avoid a collision. His motorcycle knocked into the left side of the bus.

Unlike the plaintiffs, the defendant (the bus driver) was not able to relate how the accident occurred. The defendant in evidence merely confirmed that he was from the direction of Raub heading towards Kuala Lipis and that the plaintiffs' motorcycle knocked into the rear left-side tyre of his bus. He stopped his bus somewhere in the middle of the road, got down from the bus, and saw the motorcycle lying near the rear on the left side of his bus. He did not say from which direction the motorcycle came. Indeed, he did not mention seeing the motorcycle prior to the accident. The defendant denied cutting into the lane of the plaintiffs.

The learned Sessions Court Judge, in her grounds of judgment, found that the plaintiffs had failed to prove their case on a balance of probabilities. In so finding, she relied solely on one factor: that, based on the position of the plastic splinters as shown by the sketch plan, P2, the collision occurred on the defendant's side of the road. Since the collision occurred on the defendant's side of the road, she was, therefore, of the view that the defendant could not be guilty of negligence. With respect, her grounds of judgment was, however, and unfortunately, very brief and rather more descriptive in nature (merely restating what each of the witnesses had said in evidence), lacking an in-depth analysis of the whole evidence. In the relevant part of her grounds of judgment, she merely said:

> Daripada keterangan bebas melalui P2 yang menunjukkan kedudukan serpihan kaca, mahkamah memutuskan bahawa perlanggaran telah berlaku di lorong motorbas tersebut.
>
> Kerosakan kepada kedua kenderaan tersebut adalah konsisten dengan versi SP4 (PW4) dan versi SDl (the defendant).

For one thing, what did she mean by:

> Kerosakan kepada kedua kenderaan tersebut adalah konsisten dengan versi SP4 (PW4) dan versi SD1 (the defendant)?

Be that as it may, having made the above observations and finding, she then abruptly came to the following conclusion:

Mahkamah memutuskan bahawa pihak merayu tidak membuktikan tuntutan mereka di atas imbangan kebarangkalian. Tuntutan pihak merayu (plaintiff) ditolak dengan kos.

In my judgment, it is clear to me that the respondent/defendant (the driver of the bus) was guilty of negligence as the evidence shows that the bus cut across the path of the motorcycle ridden by the plaintiffs, in a manner that the plaintiffs could not avoid a collision. I see no good reason to doubt the credibility of the plaintiffs who were the rider (PW4) and pillion rider (PW3) of the motorcycle. They had been cross-examined and their testimony remained unshaken. Moreover, evidence regarding the nature of the damage to the two vehicles, including the point of impact to the bus, evidence regarding the likelihood of where the collision occurred (that is at point "G" in the sketch plan, P2, where plastic splinters from the plaintiffs' motorcycle were found lying on the road), and evidence of where the plaintiffs' motorcycle was found lying on the road (that is at point "F" in the sketch plan) are all consistent with the plaintiffs' version, in particular, their evidence that PW4 had swerved to the right in order to avoid the collision. It is also pertinent to note that the defendant, unlike the plaintiffs, was not able to explain how the accident occurred.

On Quantum

In Respect Of The Claim Of The First Plaintiff

A. Special Damages

It is agreed by the parties in the written submissions that the defendant pays the first plaintiff a sum of RM534 as special damages. But the nature or purpose of this special damages is not clear. Nevertheless, I made the order accordingly.

B. Special Damages: Loss Of Earnings

The first plaintiff claims for loss of earning of RM500 per month for 18 months.

The first plaintiff gave evidence that, prior to the accident, he was employed as a mechanic by his brother, one Encik Razali bin Shafie (PW2), at a workshop. The first plaintiff said that as a mechanic he was paid RM500 per month. Encik Razali confirmed the evidence of the first plaintiff and added that, after the accident, the first plaintiff did not come to work for 18 months. Neither the first plaintiff nor PW2, however, was able to produce any document pertaining to the employment of the former.

The defendant urges this court to dismiss the claim for loss of earnings on the grounds that the claim was not supported by any documentary evidence. Alternatively, it is argued that if the court is minded to make an award for loss of earnings, then it should be at the rate of RM200 per month for 18 months.

I am of the view that since the evidence of the first plaintiff was supported by the testimony of his employer, I just could not reject his evidence outright. However, I am of the view that in the light of the absence of supporting documents the amount should be reduced to RM400 per month. Therefore, the amount awarded for loss of earnings was RM400 x 18 = RM7,200.

C. General Damages

(1) Compound Grade III B Comminuted Supracondylar Fracture Of Left Femur With Extension Into Knee Joint

In respect of this injury, the first plaintiff claims a sum of RM40,000 based on the following cases:

(a) *Lee Eng Beng & Anor v. Torairajah & Anor.* [1986] 2 CLJ 421; [1986] CLJ (Rep) 173;

(b) *Victor Alphonse Sebastian & Anor v. Lee Ah Leek* [1987] 2 MLJ 21; and

(c) *Rubiah Anuar v. Lim Sang* [1998] 3 CLJ Supp. 314.

The defendant, on the other hand, submits that the award for fracture of the left femur should be RM30,000, relying on *Othman bin Ahmad v. Samsudin bin Hj. Mohd Sani & Anor* [1992] Mallal's Digest, Entry No. 888, p. 328.

The first plaintiff has suffered a serious injury to his left leg. As a result of the injury he suffers the following permanent disabilities:

(a) A true shortening of 4.5cm of his left lower limb;

(b) Wasting of his left lower limb and his inability to stand on his left leg alone and his inability to run;

(c) Marked limitation of flexion of his left knee joint and his inability to squat; and

(d) A discharging sinus in his left thigh.

Taking into account of the cases cited by the plaintiff, in particular, *Rubiah Anuar*, I made an award of RM40,000 for this injury. In *Rubiah Anuar*, the award for a compound fracture of the medial condyle of the right femur was RM37,000. The court there relied on *Victor Alphonse Sebastian* (where the

award was RM33,000) as a guide. In the present case, the award is higher by RM3,000, if compared to *Rubiah Anuar*. But I think this is justified taking into account the permanent disabilities suffered by the first plaintiff (as set out in (a) to (e) above) in the case before me. The facts of *Rubiah Anuar* do not disclose the presence of such permanent disabilities.

(2) Closed Fracture Mid-shaft Left Radius

The plaintiff claims RM12,000 on the authority of *Angappan v. Phua Kim Cheng, Administrator of the Estate of Phua Teck Guan, deceased*, Mallal's Digest, Damages (Personal Injury or Death), Entry No. 1179, p. 343. In this Singapore case cited (decided in 1992), the award handed down by the court for a fracture of the left radius was S$12,000.

The defendant, on the other hand, suggests a sum of RM8,000 basing on *Er Siew Keng v. Eng Thiang Lai* [1990] 1 CLJ 488; [1990] 2 CLJ (Rep) 36. In this case cited by the defendant, the High Court had made an award of RM15,000 for the fracture of the right radius and ulna.

I think *Angappan*, although a Singapore case, is a better guide as compared to *Er Siew Keng*. First, *Angappan*, like the present case, concerns a fracture to the left radius, whereas the latter case concerns a fracture of both ulna and radius. Second, while *Er Siew Keng* was decided in 1990, *Angappan* was decided in 1992 and therefore much nearer in point of time to the present case. I think an award of RM12,000 would be fair for this particular item of injury, although this amount is much lower than the award made in *Angappan*, which was in Singapore dollars.

(3) Closed Fracture Of Left Fourth Metacarpal

The first plaintiff suggests a sum of RM4,000, whilst the defendant proposes a sum of RM2,000. I am of the view that on the authority of *Sulaiman bin Aziz v. Abd. Razak bin Abd. Wahab,* Mallal's Digest (Personal Injury or Death), Entry No. 1261, p. 378 and *Rohani bt. Mamat & Ors. v. Wan Ismail bin Wan Talib & Anor,* Mallal's Digest, (Personal Injury or Death) Entry No. 741, p. 213, the appropriate award should be RM4,000.

The defendant relies on *Shuib bin Awang v. Abdul Manan bin Abdul Latif* [1992] Mallal's Digest 339. There the court made an award of RM4,000 for the fracture of two metacarpals.

However, in *Rohani bt. Mamat*, the award for a long oblique fracture of first metacarpal of right hand was RM4,000; and in *Sulaiman bin Aziz* the award for the fracture of fifth metacarpal was also RM4,000.

(4) Scarring

The first plaintiff submits the sum of RM10,000, whilst the defendant contends that it should be RM3,000. The first plaintiff relies on *Yee Yat Wah v. Hoo Wong & Anor.*, Mallal's Digest, Damages (Personal Injury or Death), Entry No. 1278, p. 1278; *Ji Wee Sin v. Lim Chong Soon & Anor.*, Mallal's Digest Damages (Personal Injury or Death), Entry No. 1074, p. 298; and Rubiah Anuar.

The defendant, on the other hand, did not cite any authority.

Using the cases cited by the first plaintiff as a guide, I am of the view that an award of RM10,000 would be fair and reasonable.

In *Yee Yat Wah* (decided in 1994), the award for scars (including a longitudinal 9 cm. scar extending from the ventral surface of the base of the penis into the perineum) was RM12,000. In *Ji Wee Sin* (decided in 1993), the Singapore High Court made an award of S$8,000 for scars (in particular, scars over right sheen). In *Rubiah Anuar*, the court awarded RM10,000 for the following scars suffered by the plaintiff:

(a) A vertical linear operative scar 13 cm long on the lateral aspect of the right lower thigh;

(b) A curvilinear operative scar on the front of the right knee 24 x 2 cm. long; and

(c) A 14 x 7 x 12 x 8 cm. quadrangular hypopigmented scar on the front of the right thigh.

The total amount of the awards for general damages for personal injuries was RM66,000 (RM40,000 + RM12,000 + RM4,000 + RM10,000 = RM66,000). From this amount, I have deducted 10% for overlapping, thus leaving a sum of RM59,400.

In Respect Of The Claim Of The Second Plaintiff

A. Special Damages

It is agreed by both parties that the defendant do pay the second plaintiff a sum of RM162 as special damages. I made the order accordingly. However, just as in the case of the first plaintiff, the nature or purpose of this special damages is not clear.

B. Special Damages: Loss Of Earnings

The second plaintiff has given evidence that he, like the first plaintiff, also worked for PW2 as a mechanic, with a salary of RM400 per month, and this was confirmed by the evidence of his employer, PW2. The second plaintiff also said that as a result of the accident he was unable to work for one year.

Although I see no reason not to accept this evidence of the second plaintiff, nevertheless, in view of the absence of supportive documentary evidence, I reduced the amount to RM300 per month. Thus the amount awarded for loss of earnings was RM300 x 12 = RM3,600.

C. General Damages

(1) Closed Fracture Of Left Femur

The permanent disabilities suffered by the second plaintiff as a result of the fracture to the left femur are as follows:

(a) 1.5 cm. shortening of left lower limb;

(b) wasting of left lower limb and inability to stand on left leg alone for too long and inability to run;

(c) limitation of flexion of the left knee joint and inability to squat; and

(d) discharging of sinus due to chronic osteomyelitis.

The counsel for the second plaintiff, relying on:

(a) *Lee Eng Beng*;

(b) *Victor Alphonse Sebastian*; and

(c) *Rubiah Anuar*;

urges the court to make an award of RM35,000. On the other hand, counsel for the defendant, citing *Chong Kam Siong v. Herman bin Baharuddin* [1992] Mallal's Digest, Entry No. 908, p. 343, argues that, for the fracture of the left femur and other injuries, the second plaintiff should be paid a global sum of RM20,000.

In my view, based on the cases cited, in particular, *Rubiah Anuar*, the amount of RM35,000 for the fracture of the left femur, is a fair sum to be awarded.

(2) Cerebral Concussion

The learned counsel for the second plaintiff submits a sum of RM5,000, on the authority of:

(a) *Fauziyah bt Mansor v. Abu Bakar bin Hussin*, Mallal's Digest, Damages (Personal Injury and Death), Entry No. 1143, p. 325; and

(b) *Chan Kau Tong v. Ngoh Yong Sin* [1965] 2 MLJ 26.

In case (a) above, a Singapore High Court case (date of hearing: 1993), the award for cerebral concussion was S$3,000.

In case (b), the award given by the High Court of Singapore in 1965 for cerebral concussion was S$5,000. There, the injury was more serious as there was a retardation in the cerebration and the patient was rather slow in voicing opinion. However, there was no gross impairment of intelligence and the brain did not suffer any permanent organic mage.

In my judgment, in the present case, relying on the aforesaid cases (a) and (b) as comparables, I am of the opinion that an award of RM5,000 is reasonable.

(3) Scarring

The second plaintiff, as a result of the injury, suffers a 17 cm. healed scar on the left thigh. Based on the authorities earlier cited when dealing with the first plaintiff, I awarded the second plaintiff a sum of RM5,000.

The total amount of the awards for general damages for personal injuries was RM45,000 (RM35,000 + RM5,000 + RM5,000 = RM45,000). From this amount, likewise, I have made a deduction of 10% for overlapping, thereby leaving a sum of RM40,500.

I awarded costs to the appellants/plaintiffs in respect of the proceeding before this court and also in respect of the proceeding before the lower court.